LEMBAGA KEMAJUAN TANAH PERSEKUTUAN

v.

MUDA JUSOH

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
AJAIB SINGH SCJ
[SC CIVIL APPEAL NO. 01-29-90]
28 FEBRUARY 1991

LABOUR LAW: *Workman - Accident - Damages - Principal - Action commenced 46 months after date of accident - Statute barred - Date of accident - Exceptions - Public Authorities Protection Act 1958, s. 2(a) - Workmen's Compensation Act 1952, ss. 12(1), 19(1).*

LIMITATION: *Statutory authority - Contractor employed workman - Accident in course of employment - Action commenced 46 months after accident - Whether statute-barred - Exception - Issue of limitation not raised until appellate stage - Mistake - Onus on workman - Public Authorities Protection Act 1948, s. 2(a) - Workmen's Compensation Act 1952, ss.12(1), 19(1)*

CIVIL PROCEDURE: *Leave allowed to amend petition to include limitation - Appeal before trial Judge - Appeal dismissed as limitation issue not raised earlier - Effect of trial Judge allowing amendment - Merits.*

The appellant LKTP, a statutory authority, in the course of carrying out its objectives under the Land Development Act 1956 engaged a contractor to clear an area of jungle for rubber planting. The contractor employed the respondent R on 23 June 1979 as a chain-saw operator; on 26 July 1979, R had an accident in the course of his employment.

R only instituted an action for compensation 46 months after the accident, that is, on 28 May 1983. At an enquiry held by the Commissioner of Labour under s. 27 of the Workmen's Compensation Act 1952, (the 1952 Act), the Commissioner assessed compensation at RM7,787.33 payable by LKTP to R. This award was confirmed by the arbitrator in the Sessions Court on 7 May 1987.

LKTP appealed to the High Court on the basis that:

(a) R's claim was statute barred under s. 12(1) of the 1952 Act as R's claim should have been instituted within 6 months of date of the accident and

(b) R's claim was statute barred under s. 2(a) of the Public Authorities Protection Act 1948 (the 1948 Act) which provides for the filing of a claim within 36 months of date of the accident.

L was allowed to amend the petition of appeal to include the above; however the trial Judge dismissed LKTP's appeal, ruling that it was too late for LKTP to raise the question of limitation at that stage and that LKTP was liable to pay because it was a 'principal' under s. 19(1) of the 1952 Act. LKTP appeals this decision.

The issues for the Court were whether:

(a) LKTP is a principal within the meaning of s. 19(1) of the 1952 Act and

(b) whether the law of limitation should be applied although it was not raised until the appeal before the learned Judge.

Held:

[1] Section 19(1) of the 1952 Act is intended to extend to a case of a person who for the purpose of his trade or business, undertakes work on his account and employs a contractor to do the whole or part of the work; in this case, the work that was being carried out by R, even though R was employed by a contractor was in the course and for the purpose of the appellant's business.

[2] (a) Once the trial Judge allowed the amendment to be made to the petition of appeal, it became an issue which should be considered in the appeal; the point raised should then be considered on its merits and if the learned Judge found as he did in this case that the claim was statute barred then the appeal should have been allowed;

(b) the action is time barred under s. 12(1) of the 1952 Act and also under s. 2(a) of the 1948 Act;

(c) under s. 12(1) of the 1952 Act, there is a requirement of notice and there is also requirement as to period of making a claim - therefore the claim by R should have been instituted within six months of the date of the occurrence of the accident.

[3] (a) The law of limitation raises the question of jurisdiction and jurisdiction cannot be conferred by acquiescence or waiver;

(b) s. 12(4) of the 1952 Act provides for an exception to the requirement of s. 12(1) in that the failure to make a claim within the period specified shall not be a bar to the maintenance of the proceedings if it is found by the Court that the failure was occasioned by mistake, absence from Malaysia or other reasonable cause;

(c) the onus of showing the factors in (b) above is on the claimant - there is nothing in the record of proceedings before the Commissioner or arbitrator or the learned Judge of the High Court of any explanation by R for the failure to comply with the provision of s. 12(1) of the 1952 Act;

(d) once the statutory instrument, in this case the provision of s. 12(1) of the 1952 Act, has been brought to the Court's attention it is the Court's duty to apply it;

[Appeal allowed.]

Cases referred to:

Cooper & Crane v. Wright [1902] AC 302
Hockley v. West London Timber and Joinery Company [1914] 3 KB 1013
Potter v. John Welch & Sons, Limited [1914] 3 KB 1020
Riches v. Director of Public Prosecutions [1973] 2 All ER 935
Skates v. Jones & Co. [1910] 2 KB 903
Snell v. Unity Finance, Ltd. [1963] 3 All ER 50
Soon Peng Siong v. Sin Yuh Miaw [1960] 2 MLJ 64

Legislation referred to:

Land Development Act 1956, s. 65
Public Authorities Protection Act 1948, s. 2(a)
Workmen's Compensation Act 1906 [UK], ss. 2, 4
Workmen's Compensation Act 1952, ss. 12(1), (4), 19(1), (2), 27, 30

For the appellant - S. Kulasegaran (Rajendra Kulasegaran with him); M/s. Ranjit Thomas & Kula
For the respondent - Mohd. Akhir bin Mohd. Desa; M/s. Mohd. Akhir & Partners

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

The appeal is against the decision of the High Court Judge (Mustapha bin Hussain J) who had earlier dismissed an appeal by the appellant against the judgment of the arbitrator confirming the award made by the Commissioner for Labour under the Workmen's Compensation Act 1952. The total amount of compensation awarded was RM7,787.33.

The appellant is a statutory authority under the Land Development Act 1956 which body was established under that Act to promote and carry out projects for land development and settlement and for purposes connected therewith. In the course of carrying out its objectives the appellant engaged a contractor to fell and clear the jungle in an area and to prepare the land for rubber planting. The respondent was employed by the contractor on 23 June 1979 as a chain-saw operator to fell trees and was paid RM25 per day. On 26 July 1979 the respondent met with an accident while so employed.

The respondent instituted action for compensation on 25 May 1983, that is about three years and ten months after the accident. An enquiry was held by the Commissioner for Labour at Kuala Pilah on 10 August 1983 under s.27 of the Workmen's Compensation Act 1952 where the Commissioner computed a compensation of RM7,787.33 to be paid by the appellant to the respondent.

On 13 September 1983 the case of the respondent was referred to the arbitrator in the Sessions Court Seremban under s. 30 of the Workmen's Compensation Act. The arbitrator confirmed the award on 7 May 1987.

When the appeal came to the High Court Seremban the appellant was allowed by the learned Judge to make an amendment to the petition of appeal. The amendment allowed was in relation to the law of limitation to be applied against the respondent which became one of the issues in this appeal. The amendment reads as follows:

> 4. The respondent's claim was void and statute-barred pursuant to s. 12(1) of the Workmen's Compensation Act 1952. Accordingly, the arbitrator lacked jurisdiction to hear the respondent's claim pursuant to s. 12(1) (*ibid*). The respondent's claim against the appellant should have been instituted within 6 months of the date of the accident upon which the claim is based, that is, within 6 months of 26 July 1979, whereas the respondent instituted his claim against the appellant vide Borang G of the Act (ibid) only on 25 May 1983, that is, 3 years and 10 months later.
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> 5. Additionally and without prejudice to paragraph 4 hereinabove, the respondent's claim is also void and statute-barred pursuant to s. 2(a) of the Public Authorities Protection Act 1948, as applied to the appellant by virtue of s. 65 of the Land Development Ordinance 1956, under which the respondent's claim against the appellant ought to have been instituted within 36 months of the date of the accident upon which the claim is based, that is, within 36 months of 26 July 1979, whereas, in fact, the said claim was instituted vide Borang G of the Workmen's Compensation Act 1952, only on 25 May 1983, which was 3 years and 10 months later.

After hearing the appeal the learned Judge dismissed the appeal and among other things ruled that it was too late for the appellant to raise the question of limitation at that stage and secondly, the appellant was liable to pay because the appellant was a "principal" within the meaning of s. 19(1) of the Workman's Compensation Act. These two rulings became the issues in the present appeal.

It is not disputed that the question of limitation was not raised before the Commissioner nor before the arbitrator. It was raised in the appeal when the petition of appeal was amended with the leave of the learned Judge.

The issue whether the appellant is the "principal" within the meaning of s. 19(1) of the Act should be determined first. It was the view of the learned Judge that the appellant would be liable if the work that was being carried out by the respondent was for the purpose of or in the course of the appellant's trade or business. The learned Judge recognised that the appellant is a statutory body entrusted with the duty of clearing jungles and to see that the areas so cleared are suitable for planting rubber and palm oil. The learned Judge ruled that the work that was being carried out by the respondent even though the respondent was employed by a contractor, was in the course and for the purpose of the appellant's business.

We agree with the view of the learned Judge on this issue. For the purpose of determining this issue the operative words in s. 19 of the Workmen's Compensation Act 1952 are:

> the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him.

Subsection (2) of s. 19 of the Act also provides that:

> Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the person who would have been liable to pay compensation to the workman if this section had not been enacted.

Following *Hockley v. West London Timber and Joinery Company* [1914] 3 KB 1013 the test to be applied to s. 19(1) of the Act should be as stated in *Soon Peng Siong v. Sin Yuh Miaw* [1960] 2 MLJ 64 which is a Singapore case dealing with an equivalent provision:

> In order that s. 19(1) of the Workmen's Compensation Ordinance shall apply there must first be work undertaken by the principal; secondly, the work must be in the course of, or for the purpose of his trade or business; and, thirdly, he must contract with another person for the execution of the whole, or some part, of the work. Whether the work is undertaken by the principal is in each case a question of fact.

The rationale of s. 19(1) is as described by Halsbury LC in *Cooper & Crane v. Wright* [1902] AC 302 in the House of Lords when dealing with s. 4 of the English Workmen's Compensation Act 1906 that it was:

> the general design of the statute to enable an injured workman to make a claim for damages against an employer even if he was not the immediate employer of the person injured.

At p. 321 His Lordship said:

> Now, it appears to me that the general design of the statute was to enable an injured workman, or, in the event of his death, his representatives, to make a claim for damages against the employer in the sense of a person who was constructing the building, even if he was not the immediate employer of the person injured. The theory to the Act is that, apart from any negligence or misconduct, a man employed in certain dangerous employments shall in a certain sense be insured against any accident that takes place in the course of his employment. It was probably obvious to the legislature that, if the workman was driven to sue a sub-contractor and could not rely upon the responsibility

> of the person engaged to perform the whole work, a series of sub-contracts might render it practically impossible for him to ascertain the person whom he ought to sue, or, if he did, to obtain satisfaction by suing a person able to pay damages. But then the legislature seems to have provided that though the contractor for the whole work might be sued even by a person not immediately under his control or in his employment, yet, the theory of the statute being that the employer was to be made liable, the contractor for the whole work might procure his indemnity for the liability against the actual employer of the injured workman.

It is obvious to us therefore that the provision of s. 19(1) of the Workmen's Compensation Act is intended to extend to a case of a person who for the purpose of his trade or business undertakes work on his account and employs a contractor to do the whole or part of the work. See also *Skates v. Jones & Co.* [1910] 2 KB 903.

The next issue raised in the appeal is the question whether the law of limitation should be applied although not raised until the appeal before the learned Judge. In his grounds of judgment the learned Judge disallowed the question as the point was raised too late although he admitted that the respondent instituted the action some three years and ten months after the accident.

We are of the view that the learned Judge misdirected himself on this issue. Once he allowed the amendment to be made to the petition of appeal it became an issue which should be considered in the appeal. The point raised should then be considered on its merits and if the learned Judge found as he did in this case that the claim was statute barred then the appeal should have been allowed.

The position in regard to the institution of the proceeding by the respondent is very clear. The action is time barred under s. 12(1) of the Workmen's Compensation Act 1952 and also s. 2(a) of the Public Authorities Protection Ordinance 1948.

Section 12(1) of the Act reads:

> Except as provided in this section proceedings for the recovery of compensation for an injury under this Act shall not be maintainable unless notice of the accident in respect of which such compensation is claimed has been given to the employer within seven days after the happening thereof and unless a claim for compensation with respect to such accident has been made within six months from the happening of the accident causing the injury, or, in case of death, within six months from the date of the death.

There is a requirement of notice and there is also requirement as to period of making a claim. Therefore the claim by the respondent should have been instituted within six months of the date of the occurrence of the accident, that is, within six months from 26 July 1979.

The law of limitation raises the question of jurisdiction and jurisdiction cannot be conferred by acquiescence or waiver. Section 12(4) of the Workmen's Compensation Act provides for an exception to the requirement of s. 12(1) in that the failure to make a claim within the period specified shall not be a bar to the maintenance of the proceedings if it is found by the Court that the failure was occasioned by mistake, absence from Malaysia or other reasonable cause.

The onus of showing mistake, absence from Malaysia or other reasonable cause is on the claimant. There is nothing in the record of proceedings before the Commissioner or arbitrator or the learned Judge of the High Court that any explanation at all was given by the respondent for the failure to comply with the provision of s. 12(1) of the Act.

Here this Court is not dealing with a matter of admission of new evidence. Once the statutory instrument, in this case the provision of s. 12(1) of the Act, has been brought to the Court's attention it is the Court's duty to apply it. A somewhat similar situation arose in *Snell v. Unity Finance, Ltd.* [1963] 3 All ER 50. There the action was for damages arising out of the condition of a car sold under a hire-purchase agreement. Illegality of the agreement was not pleaded and not raised in the County Court when judgment was given for the plaintiff. On appeal it was held:

> (i) once the facts which made the hire-purchase agreement illegal had become apparent to the County Court it was the Court's duty, whether illegality was or was not raised by the parties, to refuse to enforce the hire-purchase agreement; the Court of Appeal would not allow any limitation on appeals from County Courts by reason of the point of illegality not having been taken below to prevent the Court's giving effect to this principle, and accordingly the appeal would be allowed and the action would be dismissed.
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> (ii) (per Willmer LJ, Danckwerts LJ, concurring) taking notice of the provision of the Hire Purchase and Credit Sale Agreements (Control) Order 1960, was not a matter of admission of new evidence (cf., per Diplock LJ, at p. 61, letter F, post) on appeal to prove the order, but, the statutory instrument having been brought to the Court's attention, the Court's duty was to apply it.

Potter v. John Welch & Sons, Limited [1914] 3 KB 1020 also dealt with a claim under the English Workmen's Compensation Act 1906. In that case a workman met with an accident and he immediately reported the matter verbally to the foreman but stated that he was not severely injured. The doctor continued to attend to the workman from time to time. Subsequently a few months later he died as a result of the original injury. There was no notice of the accident beyond what was verbally given by the workman to the employers. His widow subsequently brought an action under the Fatal Accidents Act 1846 for the benefit of herself and her children. At the trial the jury returned a verdict that the deceased had been guilty of contributory negligence and an application was therefore made to the Judge to assess compensation under the Workmen's Compensation Act 1906. On appeal it was held that since no "reasonable cause" within the meaning of s. 2 of the 1906 Act had been shown for the failure of the workman to give notice of the accident to his employers the widow was not entitled to compensation under the Act. Lord Cozens-Hardy MR said at p. 1030:

> In those circumstances, what was the "reasonable cause" for the failure to give notice of the accident? I dare say the man was ignorant of the law, but that is no excuse. In my opinion, with the greatest possible respect to Channell J., there was no evidence in this case to justify the finding that there was "reasonable cause" for not giving notice within the meaning which has been given to those words by this Court in many cases. I think therefore the appeal must be allowed.

Reverting to the present appeal before us there is room for escape from the strict compliance of the provision of s. 12(1) of the Workmen's Compensation Act and as pointed out earlier this is provided in subsection (4) of that section. Under the provision of that subsection it is up to the claimant to satisfy the Court that the delay in making the claim was due to a mistake or absence from Malaysia or other reasonable cause. The onus was never discharged by the respondent. The issue was never raised before the Commissioner or the arbitrator and when the issue was raised before the learned Judge no explanation was given as required by subsection (4) of s. 12. Therefore as Russell LJ said in *Riches v. Director of Public Prosecutions* [1973] 2 All ER 935:

If there is any room for an escape from the statute, well and good; it can be shown. But in absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

We accordingly allow the appeal. Since the issue of limitation was never raised until the appeal before the learned Judge we make no order as to costs.

Also found at [1991] 2 CLJ 894